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U.S. Citizenship and Immigration Services

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[redacted]

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JAN 11 2005

FILE: WAC 03 072 51316 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Delaware in 1978 and authorized to conduct business in the State of California in June 1979. It markets and sells fabricated and installed vacuum insulated pipe and accessories. It seeks to employ the beneficiary as its regional sales manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the petitioner wholly owns and subsidizes the beneficiary's foreign employer.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The record shows that through May 2002, one individual, Gary Sandercock, owned 100 percent of the petitioner. The record also contains the foreign entity's certificate of incorporation and list of shareholders. The shareholders of the foreign entity are:

[redacted] e beneficiary)	20,000 shares
	300 shares
	4,500 shares
	100 shares
	100 shares

The petitioner provides a copy of a representative agreement between the petitioner and the foreign entity. In the July 2002 agreement, the petitioner and the foreign entity agree that the foreign entity is an independent contractor that is remunerated for services as the petitioner's company representative in the Philippines.

The director determined that the petitioner had not provided evidence of a qualifying relationship between the two entities.

On appeal, counsel for the petitioner asserts that the Philippines foreign entity "nominally gives independent control and ownership to the Philippines business" to comport with Philippines law. Counsel provides a copy of the Philippines Foreign Investments Act of 1991. Counsel also asserts that the petitioner provides all funding for the foreign entity in the form of salary, bonuses, and business expenses and provides evidence of wire transfers to the foreign entity for salary, bonuses, and business expenses. Counsel contends that this evidence is sufficient to establish a qualifying business relationship between the two entities.

Counsel's assertions are not persuasive. Although the petitioner and the foreign entity may have a business relationship, this relationship does not qualify as a subsidiary or affiliate relationship as defined above. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The record indicates that the beneficiary's foreign employer had a contractual agreement with the petitioning company in the United States. The contractual agreement between the foreign organization and the United States corporation can be terminated[1] as opposed to one in which the foreign organization and a domestic organization are permanently tied together and not limited to a single, specific venture. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970). There is no evidence in the record that indicates an existing qualifying relationship between the foreign entity and the U.S. petitioner.

Beyond the decision of the director, the petitioner has not established that the beneficiary has been or will be employed in a managerial or executive capacity, for either the foreign entity or the petitioner. The beneficiary has been employed as a regional sales manager for the foreign entity and the petitioner proposes to continue his employment as a regional sales manager. The beneficiary's resume indicates that as the regional sales manager for the foreign entity he achieved sales targets, managed customer service and after sales service, headed project management on the installation of pipeline systems and cryogenic equipment, supervised a project engineer and subcontractor's activities, conducted training, and represented the entity at symposiums and exhibits. Although the foreign entity has included job descriptions for the three positions subordinate to the beneficiary, the job descriptions do not describe individuals performing managerial, supervisory, or professional tasks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, the beneficiary's job description includes duties that are non-managerial operational and administrative tasks. The description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial or executive, and what proportion is actually

[1] The July 2002 representative agreement between the beneficiary's foreign employer and the petitioner states at Section 2.0.16: "This agreement may be terminated, by either party with or without cause after the initial 12 month term, by giving to the other party written registered mail notice of thirty days."

non-managerial and non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Based on the current record, the AAO is unable to conclude that the beneficiary performed primarily managerial or executive duties for the foreign entity as defined by the statute. *See* sections 101(a)(44)(A) and (B) of the Act.

Likewise, the description of the beneficiary's duties as regional sales manager for the United States entity does not demonstrate that the beneficiary's proposed duties would be executive or managerial. In a July 17, 2002 letter to the beneficiary, the petitioner attaches the regional sales manager job description. The job description includes duties such as: find and cultivate new customers and orders for the petitioner's products; learn, understand and perform the petitioner's order processing system; and, spend time in the office, training, making phone calls, setting appointments, preparing quotes, returning calls and general management of your sales activities. These are the duties of a salesperson. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record does not establish that the beneficiary has been or will be employed in a managerial or executive capacity for either the foreign entity or the United States petitioner.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.